Nos. 16164 and 16165

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT,

v.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, APPELLEE

UNITED STATES OF AMERICA, APPELLANT,

v.

SECURITY-FIRST NATIONAL BANK, APPELLEE

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES

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In the United States Court of Appeals for the Ninth Circuit

No. 16164

UNITED STATES OF AMERICA, APPELLANT,

v.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, APPELLEE

No. 16165

UNITED STATES OF AMERICA, APPELLANT,

v.

SECURITY-FIRST NATIONAL BANK, APPELLEE

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES [1]

JURISDICTIONAL STATEMENT

On August 25, 1955, the United States instituted separate suits against appellees to recover $1,341.08, plus interest from Bank of America and $9,719.15, plus

[1] An order by the Chief Judge filed on December 10, 1958, granted the Government's motion for permission to file a single brief for the above-captioned appeals.

interest, from the Security-First National Bank, which the Treasurer of the United States had paid to appellees upon 7 and 58 checks, respectively, bearing allegedly forged signatures of the payees, who in each instance were fictitious or nonexistent (R. 3-9; R'. 3-14).[2] The jurisdiction of the district court over the actions rested upon 28 U.S.C. 1345. On June 3, 1958, the United States District Court for the Southern District of California, Central Division, entered judgments against the United States (R. 18-20; R'. 30-31). On July 25, 1958, the United States filed notices of appeal (R. 22; R'. 31-32). The jurisdiction of this Court rests upon 28 U.S.C. 1291.

STATEMENT

The facts found by the court below were stipulated by the parties and may be summarized as follows:

a. *The Security-First National Bank* case—During the year 1949 and prior thereto, Arthur H. Lange, Aline Lange Lee, a real estate broker of Los Angeles, and her son and other members of her family[3] entered

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[2] "R. —" refers to the record in the *Bank of America* case, No. 16164; while "R.' " refers to the record in the *Security-First National Bank* case, No. 16165.

[3] In August, 1950, Aline Lange Lee and several members of her family, Augustus C. Flemmings, Jr., Harold R. Washington, Celeste C. Flemmings, Dorothy Mae Flemmings, and Theodore W. Lange, Jr., were convicted on pleas of *nolo contendere* and sentenced for conspiracy to defraud the Government with respect to false claims pertaining to the scheme of seeking the return of tax refunds alleged to be due on the basis of fictitious and fraudulent representations. S.D. Calif., Cr. Nos. 21012, 21013, 21014, 21015, 21016, 21018, respectively. Tony R. DeHart, another member of Aline Lange Lee's family, was convicted on a plea of guilty and sentenced for the same conspiracy on February 27, 1950, S.D. Calif., Cr. No. 21017.

into a scheme to defraud the United States pursuant to which they caused to be prepared fictitious "W-2" forms concerning salary and tax withheld by alleged employers and then filed income tax returns with the "W-2" forms attached in the names of the fictitious tax payers (R'. 28).[4] These returns and forms were prepared in such a way as to indicate that a refund on income tax was due and payable to the respective fictitious persons whose names appeared on the fraudulent returns (R'. 22). The names used on the fraudulent "W-2" forms and tax returns were fictitious in each instance (R'. 28). These income tax returns and accompanying withholding statements were filed with the District Director of Internal Revenue (R'. 28). The United States Treasury upon receipt of these returns issued each of the checks sued upon without first checking the records to determine whether the taxes claimed to have been paid had in fact been withheld or without otherwise making any investigation with respect to the tax returns or withholding statements (R'. 28-29).[5] The refund checks were drawn and made payable to the various fictitious payees and were mailed to the addresses given in the income tax returns (R'. 29). Each of the checks was endorsed by

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[4] As the court found, the Internal Revenue laws of the United States at the time involved in this case and at present provide that employees should receive at the end of each calendar year "W-2" forms from each employer, indicating thereon the amount of income paid by the employer to the employee, the amount of Social Security withheld and the amount of income tax withheld. The "W-2" form is filed by the employee together with his income tax return. If the amount of income tax withheld exceeds the amount of tax the employee must pay for the year, the employee indicates on his return that the excess money is either to be applied to the ensuing year's income taxes or is to be refunded to the employee. (R'. 27-28).

[5] See fn. 10, *infra*, p. 25.

the person who had signed the tax return showing the overpayment for which a Treasury check was issued to a fictitiously named payee (R'. 29). As may be seen from an inspection of the checks, on 37 of the 58 checks involved in this case the second endorsement was made by the Aline L. Lee Realty Company, 15 by Tony R. DeHart and one each by Harold Washington and Celeste Flemmings.[6] After second endorsements had been subscribed on all of the checks, they were cashed by appellee bank in the course of business (R'. 29). The checks were thereafter endorsed by the bank in the normal course of business with the statement thereon "All prior endorsements guaranteed" and were presented for payment and paid by the Government's fiscal agent (R'. 29). Upon discovery of the fraud, the United States gave notice thereof to the appellee bank with respect to all of the checks involved, demanding repayment in the amount of $9,719.15 which the bank has refused to make (R'. 29-30). The district court held that the appellee bank was not liable to the United States upon its guarantee of prior endorsements because of the view that the endorsements of the payees' names were not forged (R'. 30).

b. *The Bank of America case*—This case involves 7 fraudulently procured tax refund checks issued to 7 different fictitious or nonexistent payees (R. 13, 19-20). These checks were issued on the basis of fraudulent income tax returns filed with the United States in the names of the payees on the checks in question (R. 20).

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[6] The checks reproduced at pp. 11, 12 and 13 of the record (R'.) in this case are representative of these second endorsements. Thus, at least 54 of the second endorsements were made by or on behalf of Aline Lange Lee and her family.

Each of the income tax returns showed that the fictitious taxpayer was entitled to a refund (R. 20). Upon receipt of the false and fraudulent returns, and relying solely on them, the United States issued the 7 checks in question and mailed them to the names and addresses listed in the false tax returns (R. 20). Each of the checks was endorsed by the person who had signed the tax return on the basis of which the refund check was issued (R. 20). Prior to the time that the checks were deposited in appellee bank at least a second endorsement was added after the endorsement in the payee's name.[7] Thereafter, the bank in due course endorsed the checks "All prior endorsements guaranteed" and presented them for payment which was made by the Government's fiscal agent (R. 21). Upon discovery of the fraud, the United States gave notice thereof to the appellee bank in October 1949 and January 1950 and demanded return of the amount of the checks, a total of $1,341.08 (R. 21). Appellee has refused to make such payment (R. 21). The district court held that the "impostor rule" was applicable in this case and that the endorsements of the payees' names on the checks were not forgeries so that the United States was not allowed to recover (R. 21).

SPECIFICATION OF ERRORS

(1) In each case the district court erred in holding that appellee bank was not liable to the United States upon its guarantees of prior endorsements.

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[7] This may be seen upon inspection of the checks, one of which has been reproduced in the printed record (R. 9). The names of Tony R. DeHart and Dorothy Mae Flemmings, two of the conspirators involved in the *Security-First National Bank* case, fn. 3, *supra*, p. 2, appear on 3 of the checks.

(2) In each case the district court erred in entering judgment for appellee bank.

(3) The district court in the *Bank of America* case erred in holding that the "impostor rule" is applicable to the facts of that case.

SUMMARY OF ARGUMENT

There is unquestioned here the basic rule that the drawer who pays a check upon a forged endorsement of a payee may recover from one who receives payment, for such payment has been made in mistaken reliance upon the representation of the presenter that he has title. The court below, apparently on the basis of the decision in *Atlantic National Bank of Jacksonville* v. *United States,* 250 F. 2d 114 (C.A. 5, 1957) which related to an almost identical fact situation, avoided this rule by holding that the endorsements of the payees' names, which were fictitious or nonexistent, by the persons who had fraudulently induced the Government to issue the checks upon the basis of false and fraudulent income tax returns were not forgeries. The United States contends that the impostor rule, upon which the court relied, is not applicable to the facts of the present cases.

In Point I we show that in all essential respects these cases cannot be distinguished from *National Metropolitan Bank* v. *United States,* 323 U.S. 454 (1945), and related cases. Those cases make it clear that even the drawer's negligence in failing to prevent or discover fraud in the issuance of checks does not in itself afford a reason for relieving a presenting bank of liability for breach of a guaranty of prior endorsements since a drawer or drawer-drawee, such as United States here, owes no duty to persons volunteering to cash or collect

checks to protect them against the fraudulent issuance of a check or the consequent forgery of the payee's signature thereon. The rule of *National Metropolitan Bank* that the drawer owes no duty to the cashing or presenting bank is grounded on policy considerations which are equally applicable to the facts of the present cases. A bank need not accept a check, and before it does it can assure itself of the validity of the instrument or the responsibility of the endorser who tenders it. As a matter of banking practice, the cashing bank is not concerned with the circumstances of a check's issuance or delivery which are not known to it and can safely cash a check only on the assumption that one with whom it deals will make it good if necessary. Consequently, to afford the bank a defense against repayment because of circumstances which play no part in its determination to take the check would give it a windfall. And as recognized by the Supreme Court in *National Metropolitan Bank,* a contrary rule would diminish the desirability of negotiable paper to drawers. While recovery may be precluded when the drawer's conduct affirmatively misleads, or perhaps even if it could mislead, a person into cashing a check for a swindler, such circumstances have not been shown to exist in the present cases. The appellee banks were in no way apprised of any dealings between the alleged impostors and the Government and, indeed, cashed all of the checks only after second endorsements had been added, in most instances by the defrauders themselves. Moreover, if an inquiry had been made as to the identity of the payee either by appellee banks or any of the few prior bona fide endorsers, there is nothing to even suggest that any act of the United States or its agents

would, or could have, misled an inquirer into believing that any of the defrauders were the named payees.

In Point II we demonstrate that the so-called impostor rule may not properly be applied to the facts of these cases. The United States contends that the impostor rule, in imposing the loss resulting from the successive frauds of the same person on the drawer, may be applied as a matter of federal law only if the result is compatible with the Supreme Court's *National Metropolitan Bank* case and affords a rational basis for decision. The rule has generally been applied for a combination of reasons, many of which do not provide either a logical or appropriate basis for reliance on the rule. Thus, the actual or dominant intent criterion, frequently referred to as the principal ground for the rule, is demonstrably artificial, illogical and irrational and hence an unsatisfactory standard. Moreover, it is not apparent why it is necessary to look beyond the face of the instrument to determine the drawer's intent in the impostor cases and not otherwise. A number of other reasons frequently used to explain the impostor rule are necessarily inconsistent with *National Metropolitan Bank* because they impose the loss on the drawer primarily because he was negligent in permitting himself to be defrauded and should bear the loss because he first set in motion the machinery which ultimately resulted in the loss, even though the drawer's conduct did not mislead any person into cashing the instrument.

We recognize, however, that an analysis of the impostor cases which place the loss on the drawer does disclose a policy basis underlying those cases distinguishing them from the rule of *National Metropolitan*

Bank. For the rule has generally been applied against the drawer only in those instances where it has been felt that the drawer's conduct has imposed an unreasonable burden of inquiry with respect to determining the identity of the payee on the first bona fide transferee of the instrument from the impostor. In many cases, particularly those in which the dealings between the drawer and impostor have been by correspondence only, the casher has actually known of the dealings between the drawer and impostor leading to the issuance and delivery of the instrument. This element is neither shown nor claimed to be present here. In other impostor cases it has been assumed that if the casher had made even a most careful inquiry about the payee's identity, the impostor would have been identified as the payee and this identification would have been made possible because of some conduct by the drawer other than the mere issuance of the instrument. Here, however, there is no basis in the record for assuming that any conduct of the United States or of its agents could have misled the cashing banks into believing that the impostors were the payees even if they had attempted to identify the impostor. For neither the United States nor its agents could have identified any particular individual as the named payees. And in addition it is not shown that the alleged impostors had assumed the identities of the payees except for the purpose of making unwitnessed signatures on the fraudulent tax returns and later the endorsements of the payees' names so that an investigation as to the identity of the payees within the community to which the checks were sent would have disclosed the impersonations and the fraud.

ARGUMENT

Certain undisputed principles underlie all suits to recover payments made upon a check bearing a forged endorsement. The drawer who calls upon the drawee to pay to the order of a named payee expects that payment will be made only as ordered: if the payee's endorsement is forged and the instrument is paid by the drawee to the forger or to an innocent transferee, the drawee has not paid according to the directions of his drawer and may charge the latter's account. *Continental National Bank & Trust Co.* v. *Olney National Bank*, 33 F. 2d 437 (C.A. 7, 1929). See *First National Bank* v. *Whitman*, 94 U. S. 343, 346-347 (1876); *Leather Manufacturers' Bank* v. *Merchants' Bank*, 128 U.S. 26, 34 (1888); Brannan, *Negotiable Instruments Law* (7th ed., 1948), p. 445. The drawee, who paid the check in reliance upon the presenter's express or implied representation that he could give a valid discharge because title to the instrument had properly been vested in him, may in turn recover from the presenter the money thus paid without consideration, even though the latter is innocent of wrong. *Leather Manufacturers' Bank* v. *Merchants' Bank*, 128 U.S. 26 (1888); *Security Savings Bank* v. *First National Bank*, 106 F. 2d 542 (C.A. 6, 1939); Brannan, *Negotiable Instruments Law* (7th ed., 1948), pp. 447-451. And this right of recovery against the presenter exists where the drawer and drawee are the same, for example, two agencies of the United States, as is the case here. *National Metropolitan Bank* v. *United States*, 323 U.S. 454 (1945); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943).

The applicability of these unchallenged rules to these cases was avoided by the determination of the court below that the endorsements of the payees' names on the checks involved here were not forgeries because of the so-called impostor rule. The court did not file an opinion in either case. Presumably the court regarded the split decision of the Court of Appeals for the Fifth Circuit in *Atlantic National Bank of Jacksonville* v. *United States,* 250 F. 2d 114 (1957), which applied the impostor rule to facts indistinguishable from those involved here, as controlling, or at least persuasive, authority. There, Howard, a United States Deputy Tax Collector, prepared false "W-2" forms and accompanying tax returns which claimed refunds in the names of 109 nonexistent persons. As a result, refund checks were issued to the persons named on the tax returns and mailed to the addresses indicated on the tax returns. The checks were then obtained, as here, by the defrauder in an unexplained manner. He thereupon endorsed each of the checks in the name of the payee and added a second fictitious endorsement on all but three of the checks before depositing them in various bank accounts. The majority, in reversing the district court judgment which had deemed *National Metropolitan Bank* to be controlling, held that the United States must have intended Howard to be the payee because he was the one who had submitted the papers on the basis of which the refund checks were issued and also that the "necessity for unfettered circulation of the Government's negotiable paper" would forbid placing the loss on the banks who had guaranteed the genuineness of prior endorsements. 250 F. 2d at 118. Judge Rives dissented. It is our position that

Atlantic National Bank was incorrectly decided and should not be followed by this Court.

I

The Rule of *National Metropolitan Bank* v. *United States,* 323 U. S. 454, Is Controlling and Requires a Reversal of the Judgments Below

The decision below, in holding that the endorsements of the payees' names were not forgeries, is inconsistent with the controlling decision of the Supreme Court in *National Metropolitan Bank* v. *United States,* 323 U.S. 454 (1945), and the decisions in the Courts of Appeals for the District of Columbia and Second Circuits in *Washington Loan & Trust Co.* v. *United States,* 134 F. 2d 59 (C.A.D.C., 1943), and *Onondaga County Savings Bank* v. *United States,* 64 Fed. 703 (C.A. 2, 1894). These cases have clearly established as the federal rule that where the Government is induced by fraud to issue a check to a fictitious or nonexistent payee or to a real person who has no knowledge of the fraud, and the endorsement in the name of the designated payee is made by the person fraudulently inducing the issuance of the check, the endorsers will not be relieved of their contracts guaranteeing the genuineness of prior endorsements solely on the ground that the issuance of the check was procured through fraudulent devices which the drawer had failed to detect prior to the issuance and delivery of the check. While we recognize that recovery may be precluded when the Government's negligence is of an affirmative character and directly affects the conduct of the cashing or presenting bank, there is here neither claim nor showing that appellees were induced by any conduct of the United States, other than by the issuance of the checks,

to present the checks and collect the proceeds and turn them over. But, as previously noted, the Fifth Circuit in the *Atlantic National Bank* case, which is indistinguishable on its facts from the present case, stated that the *National Metropolitan Bank* case was not at variance with its decision for the reasons given in its earlier opinion in *United States v. Continental-American Bank & Trust Co.,* 175 F. 2d 271, certiorari denied, 338 U.S. 870 (1949). There the court had ruled that, for the purpose of determining whether an impostor's endorsements of the payee's name were forgeries or not, "[t]he real question [was] whether these signatures are forgeries, or mere steps in a fraud" (175 F. 2d at 272), and had concluded that the *National Metropolitan Bank* case involved forgeries, ignoring the fact that the checks in that case had been issued as a result of the fraud of the person who forged the signatures of the payees' names. And although the United States in the *Atlantic National Bank* case also relied on the *Washington Loan & Trust Co.* and *Onondaga County Savings Bank* cases, *supra,* the opinion did not attempt to distinguish those cases. We believe that an examination of the facts in the cases rejected, explicitly or by silence, as controlling by the Fifth Circuit and necessarily by the court below, as well as of the policy supporting their results, leaves no doubt but that the rule of those cases is controlling here and requires a reversal of the decision below.

A. *The Decisions in National Metropolitan Bank and Related Cases.*

In *National Metropolitan Bank* v. *United States,* 323 U.S. 454 (1945), the action was brought by the United

States to recover the sum of payments made upon 144 Government checks. The facts, which were fully stated in the Court of Appeals opinion at 142 F. 2d 474-475, show that the checks were issued as a result of the fraud of James H. Foley, a civilian clerk in the Headquarters office of the Paymaster of the United States Marine Corps in Washington, D. C. He was assigned to prepare officers' pay and mileage vouchers, to prepare checks in payment thereof, to present the checks for signature by the Paymaster or other disbursing officers duly authorized to draw checks on the Treasury, and to deliver the signed checks to the named payees. During a period of twenty-eight months, Foley forged pay and travel mileage vouchers, together with the necessary supporting travel orders, and prepared 144 Treasury checks for payment of the amounts of the forged vouchers and orders. In the ordinary course, he presented the checks to the Paymaster, who signed them. All were payable to one or another of sixteen actually existing Marine officers stationed in Washington, none of whom was entitled to the proceeds of the checks or had any knowledge of the fraud. The signed checks were returned to Foley for distribution to the several officers, but Foley, instead of delivering the checks, forged the signatures of the payees, added his own name as second endorser, and cashed or deposited them with the Anacostia Bank of Anacostia, District of Columbia. That Bank made no investigation of the genuineness of the payees' signatures, but took the checks in reliance on Foley, stamped them with the endorsement—"Pay to the order of any Bank for collection." The presenting bank likewise so endorsed

the checks, presented them to the Treasury and received payment. The Supreme Court, affirming the decision of the Court of Appeals for the District of Columbia at 142 F. 2d 474, held that the negligence of the drawer-drawee in failing to discover fraud prior to the issuance of the checks did not absolve the guarantor of prior endorsements from liability in cases where the prior endorsements have been forged. In reaching this result the Court said (323 U.S. at 458):

> There is nothing here to support the petitioner's contention that the government's conduct in issuing the checks prompted it to guarantee the payee's endorsement. Such a guarantee no more results from the issuance of government checks than any other checks. Government regulations concerning payment of its commercial paper point the other way. Treasury Regulations have made guarantee of prior endorsements a prerequisite to payment. 31 C.F.R. 202.33. This guaranty was a protection which the government sought not only as to checks which were issued in due course for a valuable consideration, but as to checks which might have been irregularly issued. That the administrative officers failed fully to perform their duty is no reason why the government should be deprived of the advantage of a guarantee independently made by one who was not under compulsion of any kind to make it. No equitable principles require that one who, for his own reasons, guarantees a payee's signature after issuance of a check, shall be relieved of his voluntarily assumed obligation because others who owed the government

obligations had previously defaulted in their obligations.

In *Washington Loan & Trust Co.* v. *United States,* 134 F. 2d 59 (C.A.D.C., 1943), the United States sued to recover the amount paid to defendant banks on 1072 Treasury checks which had been issued as the result of a fraudulent scheme perpetrated by a person named Stitely, who was chief of the voucher unit of the accounts section of the Park Service. It was his duty to prepare bi-monthly payroll vouchers in the names of employees of the Service, present them to the disbursing officers and receive and distribute the checks payable to such employees. For four years Stitely made up fraudulent payroll vouchers for fictitious and nonexistent employees of an imaginary Civilian Conservation Camp. These he took to the office of the Chief of Finance each pay day and received checks payable to the persons on the legitimate and also on the fraudulent payrolls. The checks on the fraudulent payrolls he retained, forged the signatures of the payees and cashed or deposited them to his account in one of the banks, defendants in the suit. In the course of its decision in favor of the United States, the court expressly held that the case did not fall within the impostor rule. While the Supreme Court made no reference to the impostor rule in the *National Metropolitan Bank* case, it should be observed that the Court of Appeals decision affirmed in that case expressly followed its earlier decision in *Washington Loan & Trust Co.,* including the holding with respect to the inapplicability of the impostor rule. 142 F. 2d 474, 475-476.

In *Onondaga County Savings Bank* v. *United States,* 64 Fed. 703 (C.A. 2, 1894), the Government sued to

recover the amount paid out on several fraudulently procured pension drafts. A pension certificate was issued and sent to Alma Wood although she had died several weeks earlier. Soon thereafter vouchers, purporting to be signed by Alma Wood and accompanied by fraudulent affidavits and certificates, were submitted and the drafts were issued on the basis of the proofs containing the forged signatures of Alma Wood. Alma Wood's endorsement as payee was then forged on the drafts in the same handwriting as that which appeared on the proofs upon which the pension agent had issued the drafts. The defendant bank cashed the drafts for Sylvester Wood, her husband, who added his name as a second endorsement. In making this payment, the bank relied on the identification of Sylvester Wood and of the signature of "Alma Wood" by one of the bank's depositors who accompanied Sylvester Wood to the bank and was personally known to the officers of the bank. In holding for the United States, the court stated (64 Fed. at 704-705):

> * * * The government had a right to rely upon the fact that the assistant treasurer would pay out no money on the draft except to Alma Wood personally, upon proof of her identity, or to some responsible person presenting her indorsement and gauranteeing its genuineness; and it is no defense to a claim that an indorsee who has, by a forged indorsement, received from the drawee money to which he is not entitled, shall refund the same, to show that the same person who deceived him into paying money on the forged indorsement of the draft also induced the government to issue the draft on a forged signature to the voucher.

On the back of the drafts was printed the following notice:

"The payee's indorsement on this check must correspond with the signature to the voucher for which the check was given. If the payee cannot write, his or her mark should be witnessed, and the witness state his or her residence in full."

It is contended that the effect of this is to make the draft payable, not to the individual named as payee, but to whoever might indorse it with the same signature as that affixed to the vouchers. There is no force in this contention. The notice was, as the district judge held, intended only to insure greater accuracy and precision, and was for the benefit of all who might thereafter deal with the drafts. The requirement that Alma Wood should indorse the drafts with the same signature with which she signed the vouchers did not operate to change the designation of the payee. It was still the "order" of Alma Wood, and of Alma Wood only, which was required to authorize the payment of the money to any one other than herself. Moreover, it in no way misled or deceived the bank, which made no effort to ascertain whether or not the signature corresponded, but cashed the drafts on the simple assurance of its depositor that the signature of Alma Wood was correct.

The *Onondaga* case was cited with the approval by the Supreme Court in *United States* v. *National Exchange Bank of Providence*, 214 U.S. 302 (1909).[8]

[8] The *National Exchange Bank of Providence* case, which was expressly followed and adhered to by the Supreme Court in the *National Metropolitan Bank*, also gives support for the proposition

These cases have established a federal rule which is dispositive here. The great majority of state court decisions have also permitted the drawer to recover where, unknown to the drawer, endorsements of the payee's name have been made by the persons causing the checks to be drawn pursuant to false claims or payrolls and no acts of the drawer could have deceived the cashing party as to the identity of the payee. *E.g., Los Angeles Investment Co.* v. *Home Savings Bank,* 180 Cal. 601, 182 P. 293 (1919); *United States Cold Storage Co.* v. *Central Manufacturing District Bank,* 343 Ill. 503, 175 N.E. 825 (1931); *McCornack* v. *Central State Bank,* 203 Iowa 833, 211 N.W. 542 (1926); *Jordan Marsh Co.* v. *National Shawmut Bank,* 201 Mass. 397, 87 N.E. 740 (1909); *City of St. Paul* v. *Merchants National Bank,* 151 Minn. 485, 187 N.W. 516 (1922); *American Sash & Door Co.* v. *Com-*

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that a guarantor of prior endorsements will not be relieved of its obligation solely on the ground that checks are cashed for the person who had also induced the Government to issue the checks by means of fraudulent devices. In that case, the issuance of 194 Government pension checks to some existing payees not entitled to pensions and some dead payees was procured during a period of about ten years by means of fraudulent vouchers which were accepted as genuine by the Government, although its records would unquestionably have permitted discovery of the frauds at some point short of the ten years. The signatures on all of the vouchers were forged. Thereafter, the endorsements of the payees were forged on each check, presumably by a William A. Munson, and the checks were regularly cashed by the National Exchange Bank of Providence, which forwarded them for collection. While the record shows only that all the signatures on both the vouchers and the checks were forged and not that the same person made all the forgeries, a logical inference would seem to be that the person who obtained and cashed the checks had also prepared the fraudulent vouchers. The Supreme Court, in directing a judgment in favor of the United States, held, *inter alia*, that negligence in the issuance of the checks or in discovery of the fraud was not a defense which the bank could interpose.

merce Trust Co., 332 Mo. 98, 56 S. W. 2d 1034 (1933); *Fitzgibbons Boiler Co.* v. *National City Bank,* 287 N.Y. 326, 39 N.E. 2d 897 (1942); *City of New York* v. *Bronx County Trust Co.,* 261 N.Y. 64, 184 N.E. 495 (1933); *Strang* v. *Westchester County National Bank,* 235 N.Y. 68, 138 N.E. 739 (1923); *Shipman* v. *Bank of the State of New York,* 126 N.Y. 318, 27 N.E. 371 (1891); *Commonwealth* v. *Globe Indemnity Co.,* 323 Pa. 261, 185 Atl. 796 (1936); see Britton, *Bills and Notes* (1943), pp. 703-709; Note, 99 A.L.R. 439; Contra: *C. E. Erickson Co.* v. *Iowa National Bank,* 211 Iowa 495, 230 N.W. 342 (1930); *Defiance Lumber Co.* v. *Bank of California,* 180 Wash. 533, 41 P. 2d 135 (1935). While the applicability of the impostor rule has not been frequently raised or discussed in these cases, the contention was specifically rejected in *Commonwealth* v. *Globe Indemnity Co., supra.* There a clerk in a department of the Commonwealth of Pennsylvania handling claims for condemnation of tubercular cattle and a confederate, not employed by the state, fabricated papers showing amounts due to various fictitious persons, the false vouchers being prepared by the confederate. The clerk placed the false papers with valid records and the fraud was not discovered by the auditor general or state treasurer or any other official as the records moved from the department of origin to fiscal officers who drew the checks, which were then mailed to the post office addresses stated in the papers. In this way, the swindlers procured the issuance of 116 checks. After obtaining them from the mails by means not shown, as is true in these cases, they endorsed the checks in the names of the payees. The court stated (323 Pa. at 270, 185 Atl. at 800):

It is also obvious from what has been said that the cases of impersonation, the so-called impostor cases, do not help appellant. They depend on the drawer's intention, a test applied by the weight of authority; the drawer is precluded (section 23) by that. If a particular person is intended and designated as payee, it is immaterial to the drawer by what name he is called; he may endorse and payment to him will be good (as was decided in *Land Title & Tr. Co.* v. *Northwestern Nat. Bank,* 196 Pa. 230, 46 A. 420) because such payment accords with the drawer's intention. But if any intention may be attributed to the Commonwealth in drawing and mailing the checks involved in this case, it is limited by what was stated on the check and by mailing it; there was here no additional evidence of intention such as handing the check to the person intended as, for example, in *Land Title & Tr. Co.'s* case, which precluded the drawer from asserting that it intended the payee to be the person who owned the property and not the person who was present at the settlement, answering to the name of and claiming to be the owner.

Thus, the court which decided *Land Title and Trust Co.* v. *Northwestern National Bank,* 196 Pa. 230, 46 Atl. 420 (1900), a leading case on the impostor rule,[9] held the rule inapplicable to facts indistinguishable from those in the present cases.

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[9] See p. 31, *infra.*

B. *The Policy of the National Metropolitan Bank Case Has Application to the Facts of the Present Cases.*

Strong considerations of policy supported the almost universal rule, which was followed by the Supreme Court in the *National Metropolitan Bank* case, that the drawer owes no duty to protect one who voluntarily cashes a check against the forgery of the payee's signature and consequently that the one cashing a check will not be relieved of his guarantee of prior endorsements on the sole ground that the check was fraudulently procured from the drawer by the forger. No one is compelled to cash a check or to accept an endorsement. The endorsee who does not know the payee and is not satisfied with the genuineness of the endorsement can, and usually will, decline to accept it or to pay out money on the strength of it. Similarly, where a check is submitted to a bank for cashing by an alleged endorsee of the payee (as in the cases at bar), the bank is not required to cash the check; if it does, it relies not upon any representations which could be derived from the fact of the check's issuance, but upon the responsibility and integrity of the person tendering the instrument to it. Checks are not likely to be cashed for an unidentified stranger, regardless of the reputability of the other names on the paper as drawer or payee. And conversely, checks drawn by an unknown maker upon an unknown drawee and endorsed by an unknown payee will readily be accepted by banks which know and are willing to rely upon the person who tenders and endorses the check for deposit or cash. For these reasons, one who pays out money on a check is not concerned with the circumstances of its issuance which are not known to him, nor with what precaution against for-

geries the drawer may have taken before or after emitting the check. If the payee's endorsement is forged and loss occurs, it is the "neglect or error" of the cashing or collecting bank in "accepting the forger's signature which occasions the loss," *Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 370 (1943), unless the drawer's lack of precaution has made it impossible, as a practical matter, for the bank to discover the forgery.

Were a contrary rule to obtain, facts unknown to a cashing bank and upon which it did not and could not rely would enable it to evade the expected result of its mistaken reliance upon the integrity or responsibility of those with whom it deals. If a check payable to the order of a named payee is stolen or lost and the endorsement forged, the loss unquestionably falls upon him who accepts the endorsement and thereafter negotiates the paper or collects it. As long as the conduct of the drawer could not mislead the casher, the situation is outwardly no different where the issuance of a check is procured by fraud and the payee's signature is forged; in both cases the drawer's direction that the drawee should pay to the order of a designated person, or the drawer-drawee's intention so to pay, has not been satisfied. Moreover, to give the cashing bank the benefit of circumstances which had no bearing upon the bank's election to accept the check would merely bestow a windfall upon it. It could not count on the defense of the drawer's failure to adopt adequate precautions; hence the bank would have to take identical precautions in all cases—*i.e.,* to satisfy itself of the responsibility of the tenderer of the check, or to identify the payee's signature. If the checks should later prove to involve

some negligence on the part of the drawer, the cashing bank would unfairly be afforded the benefit of something which was of no concern to it and which could not have been taken into account when it accepted the check.

The rule of *National Metropolitan Bank* recognizes the fact that drawer would be unwilling to risk the free use of checks if the result of any negligence, however slight, were to relieve the person accepting an endorsed check and paying out cash thereon of the responsibility to ascertain at his peril that the endorsements are genuine. The considerations supporting this belief were excellently summed up by the Court of Appeals of New York in *Gallo* v. *Brooklyn Savings Bank,* 199 N.Y. 222, 226, 92 N.E. 633, 634 (1910):

> * * * Corporations, some of them numbering their stockholders by thousands, and usually ignorant of their identity and signatures, pay their dividends by checks to the orders of the various stockholders, transmitted by mail, relying on their right to reclamation from the banks in case the checks have been indorsed or collected by persons not entitled thereto. So, also, a person will send by post to the most distant part of the country his check to the order of another person to whom he wishes to pay or transfer money, confident in the knowledge that the abstraction of the check can entail no loss on him. On the continent of Europe a different rule prevails, and payment by the drawee to a party presenting the same, of a bill drawn to order, is valid, even though the indorsement is forged, provided the drawee acts in good faith and without negligence. In England the common-law rule prevailed as to bills (but not as

to checks) until the Bills of Exchange Act of 1882, which adopted the continental rule as to sight bills, but not as to time bills, though a limited protection against forgery of the name of the payee may be had by "crossing". Such a rule would render the present business methods of this country impossible. Although at times banks have complained of the harshness of our rule, and in some instances while acting in good faith have been subjected to severe loss (*Shipman* v. *Bank of the State of N.Y.*, 126 N.Y. 318, 27 N.E. 371, 12 L.R.A. 791, 22 Am. St. Rep. 821), as a result of this rule banks are used by all classes of our people for the deposit of funds and payment is made by check to an extent unknown elsewhere. Of course a party entitled to the receipt of money may insist upon its payment in cash and not by check.[10]

The foregoing considerations are fully applicable to the present cases. It is apparent that the appellee banks in cashing the checks did not rely upon any representations as to the identity of the payees which might have been derived from the fact that the checks had been issued and delivered to the named person since with respect to each check a second endorsement had been

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[10] In this respect it should be noted that, according to information received from that Treasury, the United States cashed approximately 38 million refund checks in the fiscal year 1949 (when the checks here involved were paid) and 36 million such checks in fiscal year 1958. The volume of refund checks and the obvious desirability of making speedy payments to the taxpayers, show that the Treasury would be faced with an impossible task if, prior to issuing each refund check, it attempted to determine the existence of each payee because it could not rely on persons cashing such checks to seek proper identification from alleged payees.

added when the instrument was tendered for payment. Though appellee banks do not seem to be in any position to assert the possible rights of any prior endorsers who may have taken the checks in good faith reliance on a defrauder's endorsement of payee's name only,[11] it is not amiss to point out that there is nothing in the record to suggest that such endorsers were, or could have been, misled by the United States as to the identity of the payees. If the disbursing agent had been asked to identify the physical person claiming to be any one of the named payees, he would have been unable to do so inasmuch as his knowledge about the payee was limited to the information that appeared on the fraudulent tax return—namely, the payee's name and address as it appeared on the face of the check and also the name and address of the supposed employer (R. 28-29, R'. 20). And since it is not suggested that the assumption of the payees' names by one of the conspirators was manifested by any acts other than the unwitnessed signing of the fraudulent income tax returns and the endorsement of the checks in the names of the payees, the ability of those cashing the checks to identify the payees in these cases upon the basis of information furnished by the Government was no greater here than in the *National Metropolitan Bank* case.

While we have no quarrel with the general proposition stated by the *Atlantic National Bank* case that "it subjects banks to unreasonable burdens against

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[11]As noted above, p. 4, on at least 54 of the 58 checks cashed by the Security-First National Bank and on at least 3 of the 7 checks cashed by the Bank of America, one of the conspirators added a second endorsement which was genuine and upon which the banks necessarily relied in cashing the checks.

which they could not reasonably protect themselves short of a complete embargo on Government checks to hold them not only to a guarantee that an existing person named and intended as payee has signed the endorsement, but that the very person named and in that name and no other, had a just claim against the Government for which the check was issued'' (250 F. 2d at 118) and believe that it suggests the basic policy for the impostor rule,[12] it does not afford a basis for ignoring the result and policy of the *National Metropolitan Bank* case in these cases or in the *Atlantic National Bank* case since, unless the conduct of the drawer either misleads, or at least might have misled, the banks into cashing a check for a defrauder, the burden on the banks, as we have shown, is no greater here than in *National Metropolitan Bank*.[13]

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[12] See discussion, pp. 35-46, *infra*.

[13] It is not significant that here the names of the payees were fictitious or nonexistent while in the *National Metropolitan Bank* case the names of living persons not entitled to reimbursement and without knowledge of the fraud were used. For, as is stated in Brannan's *Negotiable Instruments Law* (7th ed., 1948, at pp. 334-335):

> * * * when a maker believes that the payee is a real person, even if his signing and putting into circulation the instrument payable to a fictitious or nonexisting payee is held to be an admission that the payee is a real person, this does not show that the maker expects and intends the instrument to pass as if made to bearer. Quite the contrary, he intends it to pass only by endorsement, and if there is no such person as the payee, it simply can not pass at all. Any other rule is illogical and unjust, for the person taking an instrument purporting to be payable to a person without indorsement is not entitled to consideration, and if it is indorsed by some one in the name of the fictitious or nonexisting person the loss to the buyer of such an instrument is not due to the fact that the payee is fictitious or nonexisting, but to the fact that the instrument is indorsed by someone who is not authorized to indorse it, either by the maker or by the terms of the instrument, and the

II

The Impostor Rule Is Not Applicable to the Present Facts

While the so-called "impostor rule" may in some cases justify placing the loss resulting from successive frauds on the drawer, it is our position that neither precedent nor reason call for its application to facts of these cases. Particularly in view of the Fifth Circuit's decision in the *Atlantic National Bank* case applying the impostor rule to an almost identical fact situation, the rationale and scope of that so-called "rule" must be examined in detail. Since *Security-First National Bank* v. *United States*, 103 F. 2d 188 (C.A. 9, 1939), the only case involving the impostor rule decided by this Court, was expressly based on the law of California, rather than on federal law,[14] this Court is free to examine the impostor rule critically and to determine when and for what reasons it should be applied as a matter of federal law.[15]

The impostor rule stands for the proposition that where the drawer delivers a negotiable instrument to an impostor as payee, supposing that the impostor is the

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indorsee is in such a case no worse off than in the case of the forgery of the indorsement of the name of a real person.

Acceptance of this principle by the courts is illustrated by the *Washington Loan & Trust Co.* case where the names of all of the payees were fictitious or nonexistent.

[14] In 1943, the Supreme Court in *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943) held that the rights and obligations of the United States on commercial paper issued by it must be determined on the basis of federal, not state law, and thereby resolved the conflict among the courts of appeals on that choice of law question.

[15] The Supreme Court has never examined the impostor rule and, of the Courts of Appeals, only the Fifth and Tenth Circuits have applied the rule as a matter of federal law.

person he has falsely represented himself to be, the impostor's endorsement is regarded as a genuine endorsement as to subsequent holders in good faith. See, *e.g., Security-First National Bank* v. *United States,* 103 F. 2d 188, 190 (C.A. 9, 1939). The endorsement by the impostor is either deemed not to be a forgery or else the drawer is precluded from asserting the forgery. These alternative views stem from the fact that at common law and under Section 23 of the Uniform Negotiable Instruments Law [16] a signature which is "forged or made without authority of the person whose signature it purports to be" may not be wholly "inoperative" but may, on the contrary, confer a right against a party to a negotiable instrument if "the party against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority." But, as recognized by the Court of Appeals of New York, a "distinction between a case where there has been no forgery or want of authority and a case where a party against whom it is sought to enforce a right is 'precluded from setting up the forgery or want of authority' seldom carries any practical consequences; and the courts may at times ignore distinctions in thought which carry no practical consequences." *Cohen* v. *Lincoln Savings Bank,* 275 N.Y.

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[16] Section 23 of the Uniform Negotiable Instruments Law provides:

> When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.

399, 404, 10 N.E. 2d 457, 459 (1937). Thus, in many opinions, the question of whether a challenged endorsement of the name of the payee has been made by the person who was intended by the drawer to be the payee seems to have become obscured and confused with the question of whether a party against whom a right is asserted is "precluded" from setting up the forgery.[17] Indeed, most of the cases normally cited for the impostor rule have been based both on the ground that there was no forgery and that the drawer was precluded from asserting it.[18]

A. *The Doctrine of Actual or Dominant Intent Does Not Afford a Satisfactory Reason for Application of the Impostor Rule and Is An Unworkable Test.*

It has frequently been said that the principal ground adopted in the cases supposed to enunciate the impostor rule is that the bank in paying the impostor has merely carried out the drawer's actual intent. See, *e.g., United States* v. *First National Bank of Prague,* 124 F. 2d 484, 487 (C.A. 10, 1941); Britton, *Bills and Notes* (1943),

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[17] See, *e.g., United States* v. *Continental-American Bank & Trust Co.,* 175 F. 2d 271, certiorari denied, 338 U.S. 870 (1949); *Central National Bank* v. *National Metropolitan Bank,* 31 App. D.C. 391, 17 L.R.A.(n.s.) 520 (1908); *Montgomery Garage Co.* v. *Manufacturers Liability Insurance Co.,* 94 N.J.L. 152, 109 Atl. 296 (1920).

[18] It is of interest to note that in *United States* v. *First National Bank of Prague,* 124 F. 2d 484 (C.A. 10, 1941), the court cited many of the same cases both for the proposition that payment to an impostor "merely effectuates the intent of the drawer" (124 F. 2d at 487) and then for the estoppel proposition that "as between two innocent persons, both of whom are victims of fraud, the burden must fall upon the one whose negligence first facilitated and made possible the loss." (124 F. 2d at 488). There the latter consideration was deemed controlling and in the circumstances involved the United States prevailed against the presenting bank.

p. 724. This result is often explained by stating that the drawer has a dual intent, first that he intends to make the instrument payable to the impostor with whom he deals, either in person or by means of correspondence, and second, that he also intends to make it payable to the person whom he believes the impostor to be and that the first intent is dominant. While it is true that in the majority of the so-called impostor cases the drawer has suffered the loss and a statement appears that the drawer intended the impostor to be the payee or that first intent was dominant, a reading of the cases shows that, but with only a few exceptions, the courts have also advanced a variety of equitable considerations in support of the result. This is vividly illustrated by *Land Title and Trust Co.* v. *Northwestern National Bank,* 196 Pa. 230, 46 Atl. 420 (1900), a leading impostor case, where the court states (196 Pa. at 234-235; 46 Atl. at 421):

> [The rule that a bank is liable to its depositor when it pays out on a forged endorsement] should not apply when the check is issued to one whom the drawer intends to designate as the payee; first, because in such a case the risk is not the ordinary risk assumed by the bank in its implied contract with its depositor, but a largely increased risk, as it follows that a check thus fraudulently obtained will be fraudulently used; the bank is deprived of the protection afforded by the fact that a bona fide holder of a check will exercise care to preserve it from loss or theft, which are the ordinary risks; there is thrown upon the bank the risk of antecedent fraud practiced upon the drawer of the check, of which it has neither know-

> ledge nor means knowledge; secondly, because in such a case the intention with which the drawer issued the check has been carried out * * *.

Moreover, as has often been recognized, even by adherents to the impostor rule, the dual intents of the drawer are so inseparable that the choice of one intent as the dominant one seems to be purely arbitrary. See, *e.g., Dartmouth National Bank of Hanover* v. *Keene National Bank,* 99 N.H. 458, 115 A. 2d 316 (1955); *Cohen* v. *Lincoln Savings Bank,* 275 N.Y. 399, 407-408, 10 N.E. 2d 457, 461 (1937); Abel, *The Impostor Payee: Or, Rhode Island Was Right,* 1940 Wis. L. Rev. 161, 362 at 228-233; Note, 34 Harv. L. Rev. 76, 77 (1920); 23 Cornell L. Q. 307, 309 (1938); 15 N.Y.U.L. Rev. 289, 290 (1938); 24 Va. L. Rev. 192, 193 (1937). The unsatisfactory nature of the standard provided by the dominant intention criterion was recognized by both opinions in the *Atlantic National Bank* case. Judge Brown, speaking for the majority, stated that "there is little to breathe into the transaction [leading to the issuance of the tax refund checks] an articulate consensual 'intent' which would characterize more weighty matters or those found in a more primitive society." (250 F. 2d at 117). Judge Rives, in his dissent, asserted that the impostor rule, which the majority had stated in terms of intent, "introduces confusion, requiring the ascertainment of nonexistent intent and almost metaphysical speculation degenerating into mere logomachy." (250 F. 2d at 120).

It is therefore clear that the actual, dominant or subjective intention doctrine does not provide a workable standard for determining whether or not an impostor's endorsement should pass title to a fraudulently

obtained negotiable instrument. Furthermore, there is no necessity in the law of negotiable instruments to look beyond the face of the instrument for the purpose of ascertaining the drawer's intent and, indeed, the general practice in the law of negotiable instruments, except in some of the impostor cases, has been to disregard everything that does not appear on the face of the instrument. See *Cohen* v. *Lincoln Savings Bank*, 275 N.Y. 399, 412, 10 N.E. 2d 457, 463 (1937). The fact that the intent of the drawer is frequently derived solely from what appears on the face of the instrument is illustrated by cases like *National Metropolitan Bank*, *Washington Loan & Trust Co.*, *Onondaga County Savings Bank* and *Commonwealth* v. *Globe Indemnity Co.*, *supra*.

Thus searching for an actual intent, as opposed to the intent which appears on the face of the check, is not only arbitrary and unrealistic in the impostor cases but also unnecessary. The most that can be said for the intention doctrine is that it may provide a "means of rationalization for the purpose of supporting a desired result[,] * * * not the cause of an effect." Note, 15 N.C.L. Rev. 186, 188 (1937). For these reasons, we urge this Court to reject the intention doctrine as a test for determining when the impostor rule should be applied.

B. *Several Other Reasons Advanced For the Impostor Rule Are Not Acceptable As a Matter of Federal Law.*

In addition to the dominant intent criterion, many of the various reasons that have been advanced, either singly or in conjunction with others, cannot properly

be used to support application of the impostor rule as a matter of federal law since such reasons have now been conclusively rejected by the Supreme Court as a basis for imposing the loss resulting from successive frauds on the drawer in *National Metropolitan Bank* v. *United States*, 323 U.S. 454 (1945), and *United States* v. *National Exchange Bank of Providence*, 214 U.S. 302 (1909). Among the reasons so advanced which fall into this category are that by delivering a check to an impostor, the drawer improperly exposes the drawee to an increased risk, because the impostor will undoubtedly practice fraud to induce the drawee to cash the check;[19] that as between two innocent parties, both of whom are victims of fraud, the loss must fall upon the one whose negligence first made possible the loss;[20] and that by reason of the negligence of the drawer in allowing himself to be deceived, he is estopped to assert the forgery.[21]

Moreover, the policy in favor of free circulation of commercial paper, with which the majority in the *Atlantic National Bank* buttressed its intent finding and which was the only basis for decision in *Dartmouth*

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[19] *E.g.*, *Land Title and Trust Co.* v. *Northwestern National Bank*, 196 Pa. 230, 46 Atl. 420 (1900); *Boatsman* v. *Stockmen's National Bank*, 56 Colo. 495, 138 Pac. 764 (1914); *Cureton* v. *Farmers' State Bank*, 147 Ark. 312, 227 S.W. 423 (1921); *Uriola* v. *Twin Falls Bank & Trust Co.*, 37 Idaho 332, 215 Pac. 1080 (1923).

[20] *E.g.*, *United States* v. *First National Bank & Trust Co. of Oklahoma City*, 17 F. Supp. 611 (W.D. Okla, 1936); *United States* v. *National Exchange Bank*, 45 Fed. 163 (C.C.E.D. Wis., 1891); *Crippen, Lawrence & Co.* v. *American National Bank*, 51 Mo. App. 508 (1892).

[21] *E.g.*, *J. L. Levy & Salomon* v. *Bank of America*, 24 La. Ann. 220 (1872); *McHenry* v. *Old Citizens National Bank*, 85 Ohio St. 203, 97 N.E. 395 (1911); *Hoffman* v. *American Exchange National Bank*, 2 Neb. Unof. 222, 96 N.W. 112 (1902).

National Bank, supra, cannot, we submit, provide an independent basis applying the impostor rule as a matter of federal law solely on the ground that the first two victims of a fraud should bear the resulting loss inasmuch as precisely that criterion was rejected by the Supreme Court in the *National Metropolitan Bank* case. The distinction which the Fifth Circuit attempted to draw between the facts of the *National Metropolitan Bank* case and in the *Atlantic National Bank* case (250 F. 2d at 118) with respect to the question of negotiability is without merit since it depends on the court's unwarranted supposition that an actual intent to pay the swindler can be ascribed to the Government in the *Atlantic National Bank* case, *supra*, p. 11.

C. *Impostor Cases Imposing Loss on Drawer May Logically Be Distinguished from the Rule of National Metropolitan Bank on the Ground that in Those Cases the Drawer's Conduct Imposed an Unreasonable Burden of Inquiry on the Casher with Respect to the Payee's Identity.*

Nevertheless, an examination of the impostor situation cases including both those placing the loss on the drawer and those placing it in the party taking the instrument from the swindler, does suggest a rather consistent policy consideration underlying the double impersonation cases which distinguishes them from cases like *National Metropolitan Bank* and, of greater present importance, also from the cases at bar. A discussion of this policy will demonstrate that the Fifth Circuit's determination of intent on the grounds that there were dealings "of a kind" between the swindler and the United States and that the swindler im-

personated the payee at least in submitting the false tax returns (250 F. 2d at 118) was erroneous not only because of the uselessness of the actual intent criterion but also because it ignored the considerations which give importance to factors of drawer-impostor dealings and dual impersonation of the same person in the impostor cases.

The results in practically all of the dual impersonation [22] situation cases may be explained, we believe, on the basis of whether or not it is felt that an unreasonable burden of inquiry with respect to the identity of the payee would be imposed on the first bona fide transferee of the instrument from the impostor if the loss were imposed on such transferee. The impostor cases which impose the loss on the drawer may be divided into two general classes.

1. *Cases in which cashing party has actual knowledge of drawer-impostor dealings.*

The first of these two classes is comprised of those cases in which the first bona fide transferee of the instrument from the impostor in fact knows that the instrument was delivered or meant to be delivered by the drawer to the person seeking payment. In some instances, the drawer, after personally dealing with the impostor and delivering the check to him, has also advised the cashing bank that the person with whom the bank is dealing is the designated payee. See *United States* v. *First National Bank & Trust Co. of Oklahoma*

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[22] Most of the so-called "impostor" cases involve impersonation of the payee both for the purpose of obtaining the check from the drawer and then cashing it. In other forgery cases, there is also a single impersonation when the check is cashed.

City, 17 F. Supp. 611 (W.D. Okla., 1936); *Greenberg* v. *A & D Motor Sales,* 341 Ill. App. 85, 93 N.E. 2d 90 (1950); *Schweitzer* v. *Bank of America,* 42 Cal. App. 2d 536, 109 P. 2d 441 (1941). Occasionally, the dealings with the impostor have been conducted by the drawer's agent and when the instrument was cashed the agent identified the impostor as the person to whom the check was purposefully delivered. See *Maloney* v. *Clark & Co.,* 6 Kan. 82 (1870). In other cases, the identification has been made by a person with no knowledge of the fraud whom the drawer would or should have expected to make the identification. See *United States* v. *First National Bank of Albuquerque,* 131 F. 2d 985 (1942), certiorari denied, 318 U.S. 774 (1943); *Central National Bank* v. *National Metropolitan Bank,* 31 App. D.C. 391, 17 L.R.A. (n.s.) 520 (1908); *United States* v. *National Exchange Bank,* 45 Fed. 163 (C.C. E.D. Wis., 1891); *Crippen, Lawrence & Co.* v. *American National Bank,* 51 Mo. App. 508 (1892); *Hoffman* v. *American Exchange National Bank,* 2 Neb. Unof. 222, 96 N.W. 112 (1902); see also *McHenry* v. *Old Citizens National Bank,* 85 Ohio St. 203, 97 N.E. 395 (1911). Or the cashing bank may have been advised by a party on whom the drawer had also relied, but who was presumed by the court to have knowledge of the fraud, that the instrument was delivered to the impostor. See *United States* v. *Continental-American Bank & Trust Co.,* 175 F. 2d 271, certiorari denied, 338 U.S. 870 (1949); *Emporia National Bank* v. *Shotwell,* 35 Kan. 360, 11 Pac. 141 (1886). Finally, there are several cases in which party cashing the instrument, who was not a party to the fraud, knew that the impostor had induced the drawer to issue and deliver the instrument

to the impostor in the belief that he was the named payee. See *Heavy* v. *Commercial National Bank of Ogden,* 27 Utah 222, 75 Pac. 727 (1904); *Forbes & King* v. *Espy, Heidelbach & Co.,* 21 Ohio St. 474 (1871); see also *Citizens' Union National Bank* v. *Terrell,* 244 Ky. 16, 50 S.W. 2d 60 (1932).[23]

In those instances where the drawer upon inquiry by the casher in fact advises the casher to pay the impostor, the drawer is clearly precluded from asserting forgery. This reflects the fact that the obligation of an endorser on a guaranty of prior endorsements or of a drawee to pay only in accordance with the instructions of the drawer is deemed fulfilled when the drawee or endorser has made as broad an inquiry as to the identity of the payee as the drawer could reasonably expect. Even where the representation as to the identity of the payee is not made by the drawer personally, the facts in the cases cited above are sufficient to support the conclusion that the conduct of the drawer led the casher, after a reasonable inquiry, to believe that the impostor was the payee. This consideration was adopted by the Fifth Circuit in the *Continental-American Bank & Trust Co.* case as a reason for applying the impostor rule there when it stated (175 F. 2d 272):

> * * * If the banks see that the very person to whom a check was issued and delivered has en-

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[23] A number of cases which are ordinarily cited in support of the impostor rule with respect to negotiable instruments, though they do not involve negotiable instruments at all but relate to contracts of a different nature, belong to the same category. *Boatsman* v. *Stockmen's National Bank,* 56 Colo. 495, 138 Pac. 764 (1914); *Metzger* v. *Franklin Bank,* 119 Ind. 359, 21 N.E. 793 (1889); *Western Union Telegraph Co.* v. *American State Bank,* 277 S.W. 226 (Tex. Civ. App., 1925).

> dorsed it in the form required, the indorsement is a genuine one, although the name is a wrong one. * * *

It is apparent, therefore, that the policy considerations which compelled the result in the *National Metropolitan Bank* case, are not applicable to any of these cases since that policy has as a premise that the casher has no knowledge of the circumstances of the instrument's issuance.[24]

2. *Cases in which impostor would have been identified as payee even if reasonable inquiry had been made.*

The second class of impostor cases in which the loss is imposed on the drawer is comprised of cases in which the person cashing the instrument for the impostor has made no inquiry as to his identity but where it was, at least tacitly, assumed by the courts that even if the casher had in fact made the most careful inquiry as to the payee's identity, which could have been expected under the circumstances of each case, the impostor would have been identified as the payee.

In some instances it is expressly assumed that if identification had been sought from the impostor he would have called upon the drawer for such identification and that the drawer would then have identified the impostor as the rightful payee. See, *e.g., Missouri Pacific R.R.* v. *M. M. Cohn Co.*, 164 Ark. 335, 339, 261 S.W. 895, 896, certiorari denied, 266 U.S. 627 (1924); *Montgomery Garage Co.* v. *Manufacturers Liability*

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[24] See discussion, p. 23, *supra*.

Insurance Co., 94 N.J.L. 152, 155, 109 Atl. 296, 297 (1920); *McHenry* v. *Old Citizens National Bank,* 85 Ohio St. 203, 211, 97 N.E. 395, 398 (1911). While these cases also speak in terms of effectuating the drawer's intent, the criterion used is not the drawer's subjective intent but rather what the drawer would have told the cashing party if an inquiry had been made. For example, in the *Montgomery Garage Co.* case, in which the impostor, who had assumed a fictitious name, was given a check by defendant, the court, in holding for the party who had cashed the check, stated (94 N.J.L. at 155, 109 Atl. at 297):

> * * * In the case at bar, if the plaintiff, before cashing the check, had sent for and asked the drawer whether or not the person presenting the check was the person to whom it was intended to be paid, the answer would have been in the affirmative.

Recognition of this basis for decision also appears in *Land Title and Trust Co.* v. *Northwestern National Bank,* 196 Pa. 230, 46 Atl. 420 (1900), since the court observed that the impostor could have received payment in cash rather than by check if he had asked for it.

We believe that the foregoing consideration provides the most satisfactory explanation for the cases in which the result was stated primarily in terms of the drawer's intent and the loss was placed on the drawer.[25] For

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[25] For cases of that type see, *e.g., Fidelity & Deposit Co. of Maryland* v. *Union Trust Co.,* 129 F. 2d 1006 (C.A. 2, 1942); *Meridian National Banks of Indianapolis* v. *First National Bank of Shelbyville,* 7 Ind. App. 322, 33 N.E. 247 (1893); *Robertson* v. *Coleman,* 141 Mass. 231, 4 N.E. 619 (1886); *Famous Shoe & Clothing Co.* v. *Crosswhite,* 124 Mo. 34, 27 S.W. 397 (1894); *Merchants' Loan and Trust Co.* v. *Bank of the Metropolis,* 7 Daly 137 (N.Y. Common Pleas, 1877); *Townsend, Oldham & Co.* v. *Continental State Bank,* 178 S.W. 564 (Tex. Civ. App., 1915).

while, as we have already shown, *supra,* p. 32, the ascertainment of the drawer's actual or subjective intent is artificial and arbitrary, in these cases it is much less speculative to assume that the drawer would have identified the impostor as the payee for the casher. Our belief that this is the criterion used in determining the drawer's intent in the cases applying the impostor rule against the drawer solely on the basis of that intent derives strong support from several groups of cases, decided by courts which have otherwise followed the rule to find against the drawer, in which the drawer prevailed because the assumption that the drawer would be able or willing to identify the impostor as the payee could not be made. Thus, in cases where the drawer has had some doubts as to the identity of the impostor and has, therefore, required him to cash the check at a bank where he was known, the drawer has been permitted to recover. See *District National Bank* v. *Washington Loan & Trust Co.*, 65 F. 2d 831 (C.A.D.C., 1933); *Dodge* v. *National Exchange Bank*, 30 Ohio St. 1 (1877); see also *Gallo* v. *Brooklyn Savings Bank,* 199 N.Y. 222, 92 N.E. 633 (1910). In those cases, even though there were face-to-face dealings between the drawer and the impostor which resulted in the issuance of a check, the assumption that the drawer would have identified the impostor as the payee was contrary to the proven facts. In other cases, face-to-face dealings between the drawer and the impostor have been of such a transitory or insubstantial character that the courts have refused to make the assumption that the drawer would have identified the impostor as the payee and have accordingly imposed the loss on the casher who could therefore not have been misled by

the conduct of the drawer. See *Cohen* v. *Lincoln Savings Bank,* 275 N.Y. 399, 10 N.E. 2d 457 (1937); *Simpson* v. *Denver & Rio Grande R.R.,* 43 Utah 105, 134 Pac. 883 (1913).[26]

Perhaps the strongest support for this explanation of the intent rationale in the impostor cases is furnished by the cases in which the dealings between the drawer and the impostor have been by correspondence only, for in those cases the loss has rarely been placed on the drawer unless the casher was shown to have actual knowledge about the circumstances surrounding the instrument's issuance and, in any event, practically never on the basis of subjective intent alone.[27] That

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[26] In cases rejecting the impostor rule, *e.g., Keel* v. *Wynne,* 210 N.C. 426, 187 S.E. 571 (1936); *Tolman* v. *American National Bank,* 22 R.I. 462, 48 Atl. 480 (1901); *Western Union Telegraph Co.* v. *Bi-Metallic Bank,* 17 Colo. App. 229, 68 Pac. 115 (1902), the courts were presumably unwilling to assume that inquiry of the drawer would have been the most likely or appropriate means for identifying the payee. Thus, unless the casher had actual knowledge of the dealings between the drawer and the impostor, the correlative assumption that a normal inquiry by the casher as to the impostor's identity would necessarily have shown that he was the payee would also have been unacceptable.

[27] Of the correspondence cases usually cited in the support of the proposition that the loss has been imposed on the drawer in the majority of impostor cases regardless of whether the dealings between the drawer and impostor have been face to face or by correspondence, the following are ones in which the court relied on the fact that the casher had, at the time he dealt with the impostor, actual knowledge that the drawer had also dealt with the impostor believing him to be the payee (see discussion, pp. 36-38, *supra*): *United States* v. *Continental-American Bank & Trust Co.,* 175 F. 2d 271, certiorari denied, 338 U.S. 870 (1949); *Emporia National Bank* v. *Shotwell,* 35 Kan. 360, 11 Pac. 141 (1886); *Maloney* v. *Clark & Co.,* 6 Kan. 82 (1870); *Crippen, Lawrence & Co.* v. *American National Bank,* 51 Mo. App. 508 (1892); *Hoffman* v. *American Exchange National Bank,* 2 Neb. Unof. 222, 96 N.W. 112 (1902); *Forbes & King* v. *Espy, Heidelbach & Co.,* 21 Ohio St. 474 (1871);

these correspondence cases have usually pointed to the actual transmission of the drawer's intent to the casher, which is not true in the face-to-face dealing cases, is explained by the fact that in cases where the drawer's dealings with the impostor have been face to face it may well be said that the "name of a person is the verbal designation by which he is known, but the visible presence of a person affords surer means of identifying him than his name." *Robertson* v. *Coleman,* 141 Mass. 231, 232, 4 N.E. 619, 620 (1886). See *Montgomery Garage Co.* v. *Manufacturers Liability Insurance Co.,* 94 N.J.L. 152, 155, 109 Atl. 296, 297 (1920). In that situation, if the casher takes the impostor to the drawer for identification, or even if he only describes the physical characteristics of the impostor to the drawer by telephone or correspondence, for the purpose of having the im-

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Heavy v. *Commercial National Bank of Ogden,* 27 Utah 222, 75 Pac. 727 (1904); cf. *Boatsman* v. *Stockmen's National Bank,* 56 Colo. 495, 138 Pac. 764 (1914); *Metzger* v. *Franklin Bank,* 119 Ind. 359, 21 N.E. 973 (1889); *Western Union Telegraph Co.* v. *American State Bank,* 277 S.W. 226 (Tex. Civ. App., 1925); see *Citizens' Union National Bank* v. *Terrell,* 244 Ky. 16, 50 S.W. 2d 60 (1932). And with the exception of *United States* v. *Union Trust Co.,* 139 F. Supp. 819 (D. Md., 1956), the other usually cited correspondence cases which have placed the loss on the drawer although the casher had no knowledge of the drawer-impostor dealings, have not based their decisions solely on the impostor rule intent rationale. See *Hartford Accident & Indemnity Co.* v. *Middletown National Bank,* 126 Conn. 179, 10 A. 2d 604 (1939); *Uriola* v. *Twin Falls Bank & Trust Co.,* 37 Idaho 332, 215 Pac. 1080 (1923) (see discussion, p. 45, *infra*); *Peninsular State Bank* v. *First National Bank,* 245 Mich. 179, 222 N.W. 157 (1928); *First National Bank* v. *American Exchange National Bank,* 170 N.Y. 88, 62 N.E. 1089 (1902); *States* v. *First National Bank of Montrose,* 17 Pa. Super. 256, affirmed, 203 Pa. 69, 52 Atl. 13 (1902) (In *Commonwealth* v. *Globe Indemnity Co.,* 323 Pa. 261, 270, 185 Atl. 796, 800 (1936), the court explained that only justification for the *Montrose* result was that the drawer had sued too late—the express ground on which the lower court decision in *Montrose* had been affirmed).

postor identified as the payee, the drawer would normally be expected to so identify the impostor on the basis of the physical characteristics known to him.[28] On the other hand, where the dealings have been exclusively by correspondence, as in the present cases, the drawer would normally be in no position to identify any particular individual as the person intended to be the named payee or, if the payee was known to him personally, could in fact expose the impersonation so that in the absence of any knowledge by the casher that the drawer had in fact dealt with the impostor, and not the named payee, the drawer has generally been allowed to recover in cases based solely on the intent criterion. See *Moore* v. *Moultrie Banking Co.,* 39 Ga. App. 687, 148 S.E. 311 (1929) (drawer personally knew named payee); *American Surety Co.* v. *Empire Trust Co.,* 262 N.Y. 181, 186 N.E. 436 (1933); *Mercantile National Bank* v. *Silverman,* 148 App. Div. 1, 132 N.Y. Supp. 1017 (1912), affirmed without opinion, 210 N.Y. 567, 104 N.E. 1134 (1914); *Palm* v. *Watt,* 7 Hun 317 (N.Y. S. Ct., 1876) (drawer personally knew named payee); *Commonwealth* v. *Globe Indemnity Co.,* 323 Pa. 261, 185 Atl. 796 (1936); see also *Citizens' State Bank of McLean* v. *Fuller,* 274 S.W. 208 (Tex. Civ. App., 1925). But see *Atlantic National Bank of Jacksonville* v. *United States,* 250 F. 2d 114 (C.A. 5, 1957); *United States* v. *Union Trust Co.,* 139 F. Supp., 819 (D. Md., 1956).

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[28] This also explains why, except in cases like those discussed at pp. 45-46, *infra,* the impostor rule should only be applied in those cases when the impostor has assumed the identity of the payee both in his dealings with the drawer and the person cashing the instrument.

Other impostor cases, in which the casher has not investigated the identity of the impostor, come within the second class of impostor cases which place the loss on the drawer not because of the assumption that the drawer would have identified the impostor as the payee upon inquiry but because it appears that the impostor or swindler either bears the name of the real payee or is generally known by his assumed name in the community to which the check was sent. See, *e.g., United States* v. *First National Bank & Trust Co. of Asheville,* 92 F. Supp. 356 (W.D. N.C., 1950); *United States* v. *Liberty Insurance Bank,* 26 F. 2d 493 (W.D. Ky., 1928); *Uriola* v. *Twin Falls Bank & Trust Co.,* 37 Idaho 332, 215 Pac. 1080 (1923); *Jamieson & McFarland* v. *Heim,* 43 Wash. 153, 86 Pac. 165 (1906); see also *Slattery & Co.* v. *National City Bank,* 114 Misc. 48, 186 N.Y. Supp. 679 (1920) (drawer negligently sent check to address of a person with same name as intended payee); *S. Weisberger Co.* v. *Barberton Savings Bank,* 84 Ohio St. 21, 95 N.E. 379 (1911) (drawer negligently mailed check to Cleveland instead of New York and post office delivered it to person in Cleveland bearing payee's name). In these cases, it may be assumed that the casher could easily have determined upon inquiry in the community that a person bearing the impostor's name received his mail at the address to which the check was sent and that the person endorsing the payee's name was that individual. Accordingly, in these circumstances, as in the cases where a drawer is fraudulently induced to issue and deliver a check to a person in his proper name, it would be unreasonable to require the drawee or other cashing party to guarantee not only

the identity of the payee but also the justness of the claim for which the check was issued.[29]

D. *The Impostor Rule Is Inapplicable to These Cases Since the Conduct of the United States Did Not Impose an Unreasonable Burden of Inquiry on the Appellee Banks.*

The foregoing analysis of the impostor cases imposing the loss on the drawer demonstrates, we submit, that they can be distinguished from cases like *National Metropolitan Bank* only on the ground that the conduct of the drawer or drawer-drawee imposed an unreasonable burden of inquiry on the party cashing a check with respect to the payee's identity. None of the bases for so distinguishing an impostor case from *National Metropolitan Bank* are present in these cases however. First, there is no showing here that the party cashing the tax refund checks for the swindlers had any knowledge of the circumstances leading to the issuance or mailing of the checks.[30] Second, neither the United

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[29] The situation is to be distinguished from a case where a check is stolen by a person bearing the payee's name for in that situation the cashing party's ability to uncover the impersonation upon inquiry would in no way be hindered by the drawer's conduct in delivering the check to the impostor.

[30] Indeed with respect to each of the 58 checks cashed by the Security-First National Bank, it is patent that the bank was not in the least concerned with those circumstances since it relied, not on the validity of the payee's endorsement, but rather on the second endorsement appearing on each of the checks. Moreover, as noted above, on all except 4 of these checks, the second endorsements were in the real name of one of the conspirators. *Supra*, p. 4. Accordingly, at least with respect to those 54 checks, it would be impossible to show that any bona fide transferee of one of these refund checks from the defrauders could have been led to believe

States or any of its agents would have been able to identify the impostor as the intended payee for they had no knowledge about the payee except the information which appeared on the face of the tax refund checks and the tax returns.[31] Finally, in the absence of any showing that the alleged impostors had assumed the identity of the named payees in their daily activities and contacts so that an investigation by the banks would have determined that persons bearing the payees' names lived at the addresses given and that the endorsers were those persons, it is evident that if the United States is permitted to recover here the burden of inquiry on appellee banks will have been no greater than that in the *National Metropolitan Bank* case and hence not an unreasonable one.[32]

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that the person with whom he was dealing was the intended payee. Similarly, it appears that the second endorsement on at least 3 of the 7 checks cashed by the Bank of America are also in the true names of one of the conspirators. *Supra*, p. 5.

[31] See discussion, p. 26, *supra*.

[32] The district court gave judgments for appellees only on the ground that there had been no forged endorsements and did not reach the separate defenses of laches pleaded by both appellees in their answers (R. 14; R'. 20-21) or of the limitations provisions of 31 U.S.C. 129 pleaded by the Bank of America (R. 13-14). There is clearly no merit to either of those defenses

First, the limitations provision of 31 U.S.C. 129 that "[n]o proceeding in any court shall be brought by the United States * * * to enforce the liability of any endorser * * * arising out of a forged or unauthorized signature or endorsement upon * * * any check * * * issued by the * * * Treasurer and Assistant Treasurers of the United States, or by disbursing officers and agents of the United States, unless such proceeding is commenced within six years after the presentation to the Treasurer of the United States * * * of such issued checks * * * for payment of such check, * * * or unless within that period written notice shall have been given by the United States or an agency thereof to such endorser * * * of a claim on account of such liability * * *" are clearly inapplicable to the *Bank*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments of the District Court were erroneous and should be reversed.

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of America case in which they were pleaded. For there the checks were all presented for payment in March or April of 1949 (R. 4) and demands for repayment were made by the United States "[u]pon discovery that a fraud had been committed, on or about October 14, 1949, and January 11, 1950," (R. 16, 21)—within the six-year period allowed by the statute.

Second, neither of the appellees pleaded any facts in support of their laches defenses to show specific damages resulting from the alleged failure of the United States to give prompt notice after discovery of fraud. Since the Supreme Court has held that when the signature of the payee on a Government check is forged an endorser is not relieved of liability because of the drawee's failure to give prompt notice after learning of the forgery unless there is a clear showing that the drawee's delay in notification caused damage to the endorser and that damage occasioned by delay must be established and not left to conjecture, the laches defense must necessarily fail here. *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943). See *United States* v. *Peoples National Bank of Chicago*, 249 F. 2d 637 (C.A. 7, 1957).

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